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# Civil Rights Act of 1991

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# CIVIL RIGHTS ACT OF 1991

*Hon. Leon Lazer:*

Our last speaker, William Taylor, will discuss the Civil Rights Act of 1991. Mr. Taylor is a graduate of Yale Law School. He is in private practice in Washington, D.C., specializing in civil rights and children's rights. As Vice Chairman of the Leadership Conference on Civil Rights, he played a leading role in advocating the enactment of the Civil Rights Act of 1991.

*William L. Taylor:*

When the history of the Supreme Court in the last decades of this century is written, one important chapter will deal with the confrontations between the Court and Congress on the interpretation of civil rights laws. About two dozen times in the last decade, the Court has issued opinions (often 5-4 or 6-3) that narrowed statutory rights or remedies in important ways. This has occurred on issues of voting rights[1] and the responsibility of federal agencies to prevent discrimination in use of federal funds,[2] the rights of disabled people,[3] the availability of sover-

1. *See* City of Mobile v. Bolden, 446 U.S. 55 (1980). The plurality opinion held that a claim that Mobile's at-large election system impermissibly diluted Black voting strength could not be sustained unless there is proof of racially biased motivation. *Id.* at 62. The Court held that such motivation was a necessary ingredient of a Fifteenth Amendment violation and, since § 2 of the Voting Rights Act of 1965 was designed to track the Fifteenth Amendment, it, too, required proof of racial motivation. *Id.* at 61.

2. *See* Grove City College v. Bell, 465 U.S. 555 (1984). A private college which received no federal aid but enrolled several students who received direct federal grants was not required to comply, institution-wide, with the anti-sex discrimination provisions of § 901(a) of Title IX of the Education Amendments of 1972. *Id.* at 570-71. The Court held that only the college's financial aid program was covered by the statute. *Id.* at 571-74.

3. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985). Section 504 of The Rehabilitation Act of 1973, which prohibits employment discrimination based solely on a handicap by any program receiving federal assistance, was found not to apply to suits against a state because the Act did not express in unmistakable language an attempt to abrogate state immunity. *Id.* at 241. A state's acceptance of federal funds was therefore not enough to show that it waived its Eleventh Amendment immunity. *Id.* at 242-43.

eign immunity as a defense in civil rights cases,[4] the availability of attorney's fees in civil rights cases[5] and in other matters.[6] Each time, the Congress has taken action to restore the law to what it was widely understood to be before the Court ruled.[7]

Yesterday, Congress completed action on a comprehensive fair employment law.[8] This legislation will reverse in whole or in part, seven Supreme Court decisions issued mainly in 1989 and 1990.[9] I would like to review with you the most important parts

4. *See* Library of Congress v. Shaw, 478 U.S. 310, 323 (1986). (Court held that in enacting Title VII, Congress only intended to waive its governmental immunity from paying attorney fees as part of judgments against it, not its governmental immunity from paying interest fees).

5. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 241 (1975) (environmental organizations which prevailed in suit against pipeline company to prevent Secretary of Interior from issuing permits were not entitled to attorneys' fees under "private attorney general" doctrine).

6. *See* Public Employee Retirement Sys. of Ohio v. Betts, 492 U.S. 158 (1989) (allowed employer to deny plaintiff employment disability retirement benefits because she was over 60 years old).

7. *See* Voting Rights Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1983 (1986)) (overruling City of Mobile v. Bolden, 446 U.S. 55 (1980)); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681, 1687, 1688 (1991), 29 U.S.C. §§ 705, 794 (1990), 42 U.S.C. § 2000d-4a (1989)) (overruling Grove City College v. Bell, 465 U.S. 555 (1984)); Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400-1484 generally (1989 & Supp. 1992)) (overruling Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)); H.R. 644(1), 101st Cong., 2d Sess. (1990) (Civil Rights Act of 1990) (attempted to overrule Library of Congress v. Shaw, 478 U.S. 310 (1986)); Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1989)) (overruling Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)); Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (codified as amended at 29 U.S.C. §§ 621, 623, 626, 629, 630 (1989 & Supp. 1992)) (overruling Public Employee Retirement Sys. of Ohio v. Betts, 492 U.S. 158 (1989)).

8. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (amends Civil Rights Act of 1964, 42 U.S.C. § 2000e). The bill passed the House of Representatives on November 7, 1991 and was signed into law by President Bush on November 21, 1991.

9. EEOC v. Arabian American Oil Co., 111 S. Ct. 1227 (1991); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Patterson v. McLean

of the bill and the Supreme Court decisions that are affected by it.

Perhaps the single most important section of the bill is its provision overruling the Supreme Court's decision in *Wards Cove v. Atonio*[10] and restoring the rule of *Griggs v. Duke Power Co.*[11] *Griggs* was a unanimous decision by the Supreme Court in 1971. In an opinion written by Justice Burger, the Court held that employment practices which had an adverse impact on minorities or women could violate Title VII even without a showing of intent.[12] *Griggs* stated a rule that worked well for 18 years and that was responsible for much of the practical progress that minorities and women have made in employment over the past two decades.[13] For example, once paper and pencil tests had to be related to actual job requirements, minorities gained access to jobs as police officers,[14] firefighters,[15] over-the-road truckers,[16] and in a multiplicity of white collar operations.[17] Once irrelevant height and weight regulations were dropped, women also gained

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Credit Union, 491 U.S. 164 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Lorance v. AT&T Technologies, 490 U.S. 900 (1989); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987).

10. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

11. 401 U.S. 424 (1971).

12. *Id.* at 431.

13. The *Griggs* test is "[i]f an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited." *Id.*

14. For a summary of the gains minorities have made in the area of police employment see William L. Taylor, *Brown, Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700, 1713 (1986).

15. *See* Nash v. Consolidated City of Jacksonville, 837 F.2d 1534 (11th Cir. 1988), *cert. granted and judgment vacated*, 490 U.S. 1103 (1989) (Supreme Court vacated Eleventh Circuit opinion, which held that certain test for promoting firefighters was not sufficiently job related, after *Wards Cove* was decided.).

16. *See* Hairston v. McLean Trucking Co., 62 F.R.D. 642, 667 (M.D.N.C. 1974) (an employment requirement that all applicants have high school diploma and satisfactorily complete written test is presumptively not job related where not all of the company's employed truckers satisfied these requirements).

17. Taylor, *supra* note 14, at 1712-14.

access to jobs as police officers[18] and firefighters.[19] *Wards Cove* subverted the rule of *Griggs* by reallocating the burden of proof[20] and by changing the concept of business necessity to one of business convenience.[21]

The Civil Rights Act of 1991[22] restores *Griggs* in three ways. First, it makes clear that after the plaintiff establishes a prima facie case, by identifying a practice and demonstrating that it has a disparate impact, the burden shifts to the defendant.[23] A violation is established if the defendant fails to demonstrate, as an affirmative defense, that the practice is required by business necessity.[24]

Second, the bill resolves the controversy over how to define business necessity by not defining it. Instead, the purposes section states that the purpose is "to codify the concepts of 'business necessity' and 'job related[ness]' enunciated by the Supreme Court in [*Griggs*] and in the other Supreme Court decisions prior to [*Wards Cove*]."[25] In this way, the bill restores *Griggs*.[26]

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18. *See* Cohen v. West Haven Bd. of Police Comm'rs, 638 F.2d 496 (2d Cir. 1980) (plaintiffs, female applicants, awarded interim back pay after failing discriminatory physical agility test even though plaintiffs subsequently failed non-discriminatory agility test).

19. *See* Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1983) (court replaced discriminatory physical exam with another test which accurately reflected candidates' ability to perform firefighting duties).

20. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657-59 (1989). The Court, along with making it more difficult to establish a disparate impact, stated that once a plaintiff makes a prima facie case by showing a disparate impact resulting from a specific business practice, the defendant only has the burden of production to prove a legitimate business purpose for the practice; the plaintiff, however, is left with the burden of persuasion. *Id.*

21. *Id.* at 659-60. The Court stated that "there is no requirement that the practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." *Id.* at 659.

22. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (amends Civil Rights Act of 1964, 42 U.S.C. § 2000e).

23. Pub. L. No. 102-166, Sec. 105, 105 Stat. at 1074-75.

24. *Id.* An unlawful employment practice is also established if the plaintiff can demonstrate an "alternative business practice," as defined by the Supreme Court's understanding of the term prior to *Wards Cove*, that would not produce the same disparate impact. *Id.* at Sec. 105(a)(ii).

25. Pub. L. No. 102-166, Sec. 3(2), 105 Stat. at 1071 (citations omitted).

A third element makes clear that plaintiffs can challenge a group of practices as a single practice.[27] The bill allows this if plaintiffs show that the practices are not "capable of separation for analysis."[28] Again, this reverses a portion of *Wards Cove* that required plaintiffs to disaggregate, by proving a link between each practice and the disparate impact, even if not practical to do so.[29]

The *Griggs* section of the bill is the one that President Bush has labeled in the past as a quota bill.[30] It emerged in a form at least as strong as the versions that President Bush threatened to veto.[31] Since President Bush created this phantom or ghost in the first place, he presumably was able to exorcise it whenever he saw fit. Republican Senators, troubled by the emergence of David Duke and the aftermath of the Thomas nomination and its implication for the Republican party, persuaded President Bush to back down by telling him they might not vote to sustain a veto.[32] This was clearly a welcome development, although it would have

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26. *See supra* note 13.

27. Pub. L. No. 102-166, Sec. 105(a), 105 Stat. at 1074.

28. *Id.*

29. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989) ("[A] plaintiff must demonstrate that it is the application of a *specific* or *particular* employment practice that has created the disparate impact under attack.") (emphasis added).

30. *See* Steven A. Holmes, *Vowing to Veto Rights Bill, President Offers Alternative*, N.Y. TIMES, October 21, 1990, § 1, at 22. ("'In its present form, the measure remains a quota bill because inescapably it will have the effect of forcing businesses to adopt quotas in hiring and promotion,' Mr. Bush said in his statement.").

31. 137 CONG. REC. S15,440-02 (1991) (statement of Senator Levin). "The bill's chief sponsor, Senator DANFORTH, says this new compromise bill is not substantially different from the bill the President called a quota bill." *Id.*

32. *See* 137 CONG. REC. H8672-01 (1991) (statement of Representative Durbin).

> Remember, it was the same David Duke who cheered the president's veto of the last civil rights bill, the same David Duke who claims to feel at home with the party of Willie Horton ads and quota bashing. Clearly, the President sees this new civil rights bill as a much needed-break from the bitter legacy of the Willie Horton ads.

*Id.*

been better if the phantom had never been raised in the first place and the country spared eighteen months of divisive rhetoric on race.[33]

Section 101 of the bill deals with the *Patterson*[34] case. The issue in that case was whether racial mistreatment or harassment on the job is covered by section 1981,[35] the post civil war statute that said that all persons should have the same right as a White person to make and enforce contracts.[36] In the *Patterson* case, Mrs. Patterson alleged that she was verbally abused at her job as a bank teller because of her race.[37] Justice Kennedy, for five members of the Court,[38] said that by its plain terms, the statute covered only the making and enforcement of contracts and not their terms and conditions.[39]

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33. *See* Michael K. Frisby, *Bush, Fearing Job Quotas, Vetoes Civil Rights Bill*, BOSTON GLOBE, October 23, 1990, at A1. President Bush vetoed the Civil Rights Act of 1990, S. 2104, 101st Cong. 2d Sess. (1990), on October 22, 1990.

> With the veto, Bush joins Andrew Johnson and Ronald Reagan as the only presidents to veto civil rights legislation. A chorus of Democrats and civil rights leaders criticized the president, saying that he vetoed the bill to appease right-wing Republicans.
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> "In vetoing this legislation, President Bush has rejected the advice of leading members of his own party," [Senator] Kennedy said. "He is siding with those who are willing to divide the nation for their own partisan advantage and deny justice to millions of our fellow citizens."
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> Kennedy accused Bush of returning to racially divisive tactics such as he displayed in his 1988 presidential campaign. "But to do so as president of all the people, on an issue so important to the future of the nation as civil rights, is tragic and disgraceful," Kennedy said.

*Id.*

34. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

35. Civil Rights Act of 1870, 42 U.S.C. § 1981 (1986).

36. *Id.* The Act provides in pertinent part: "A person within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." *Id.*

37. *Patterson*, 491 U.S. at 169.

38. *Id.* at 167. Justice Kennedy's majority opinion was joined by Rehnquist, C.J., White, O'Conner, and Scalia, JJ.

39. *Id.* at 171.

Justice Brennan dissented.[40] He pointed to the legislative history of Section 1981, which included congressional concern with freed slaves who were being whipped on the job. This, he found, was a clear indication that Congress was not limiting the statute to job entry.[41] Justice Brennan also noted that if Mrs. Patterson had been explicitly advised that she could have the job but would be racially abused, she clearly would not have had the same rights as Whites.[42] Section 101 overturns *Patterson* by making it clear that the term "make and enforce contracts" includes all benefits, privileges, terms and conditions of the contractual relationship.[43]

One aspect of the bill goes beyond restoration. The *Patterson* case highlighted an anomaly in current law, the availability of damages for race discrimination under Section 1981 and the unavailability of damages under Title VII of the Civil Rights Act of 1964, particularly for gender discrimination and discrimination on the basis of disability. Section 102 of the bill establishes a new Section of the code (1977A) to accompany Section 1977.[44] This new section provides a damage remedy in the federal courts for persons who are victims of intentional discrimination (not disparate impact) under Title VII or the Americans with Disabilities Act (ADA).[45]

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40. *Id.* at 189 (Brennan, J., dissenting). Justice Brennan was joined by Justices Marshall and Blackmun; Justice Stevens joined Brennan's dissent in part, dissented on other grounds in part, and concurred with the judgment in part.

41. *Id.* at 206-07 (Brennan, J., dissenting).

42. *Id.* at 208 (Brennan, J., dissenting).

43. Civil Rights Act of 1991, Pub. L. No. 102-166, Sec. 101, 105 Stat. at 1072. Section 101 of the 1991 act adds a new subsection (b) at the end of 42 U.S.C. § 1981 which states: "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.*

44. Section 1977 of the Revised Statues, which states that everyone shall have the same rights as white persons to make and enforce contracts, is found at 42 U.S.C. § 1981.

45. Pub. L. No. 102-166, Sec. 102, § 1977A, 105 Stat. 1072; Americans with Disabilities Act of 1990, 42 U.S.C. § 12117(a) (1990).

Suits can be brought after exhaustion of administrative remedies either by the individual or by the Equal Employment Opportunity Commission.[46] Cases will be tried by juries.[47] The bill does put a cap on damages for pain and suffering, future pecuniary losses and punitive damages.[48] The caps run a range from $50,000 for small employers to $300,000 for firms with 500 or more employees.[49] In the end, the main issue was what principle justifies capping damages in sex or disability discrimination cases when they are not capped in race cases.[50] Business lobbyists did an effective job of keeping the caps on, but there will be a drive, fueled by the new awareness of the prevalence of sexual harassment,[51] for new legislation to remove the caps. Senators Mitchell and Kennedy have pledged to have legislation on the floor of the Senate early next year.[52]

Several other Supreme Court decisions were undone by the bill. In *Martin v. Wilks*,[53] the Supreme Court said that there could be unlimited numbers of third-party collateral attacks on consent

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46. Pub. L. No. 102-166, Sec. 102, § 1977A, 105 Stat. at 1072.

47. *Id.* at § 1977A(c). Any party can demand a jury trial if the complaining party seeks compensatory or punitive damages under Section 1977A. *Id.*

48. *Id.* at § 1977A(b).

49. *Id.*

50. *See* Statement of President George Bush Upon Signing S. 1745 [Civil Rights Act of 1991] 1991 U.S.C.C.A.N. 768. The Act "adopts a compromise under which 'caps' have been placed on the amount that juries may award in such cases. The adoption of these limits on jury awards sets an important precedent, and I hope to see this model followed as part of an initiative to reform the Nation's tort system." *Id.* at 769.

51. In the aftermath of Justice Clarence Thomas' confirmation hearings a scientific survey of 519 Americans resulted in findings that: "34 percent of women and 27 percent of men think the issue of sexual harassment is 'very serious,' 52 percent of women and 46 percent of men say it is 'somewhat serious'." *Wirthlin Group Survey: Most Believe Sex Complaint Would Effect Woman's Job*, PR NEWSWIRE, Nov. 21, 1991, *available in* LEXIS, Nexis Library, Wires File.

52. S. REP. NO. 286, 102d Cong., 2d Sess. (1992). "Majority Leader Mitchell promised to bring legislation to the floor of the Senate early in 1992. On November 26, [1991] Senator Kennedy, joined by 30 co-sponsors introduced the Equal Remedies Act [S. 2062]." *Id.*

53. 490 U.S. 755 (1989).

decrees or litigated judgments.[54] The Court even allowed persons who sat on the sidelines while the case was being litigated to make a collateral attack.[55] This meant open season on affirmative action agreements. The affirmative action plan in *Martin*, which enabled Blacks to gain employment in the Birmingham, Alabama police department for the first time, was allowed to be collaterally attacked by a group of White firefighters.[56] However under Section 108, third-party challenges will be foreclosed if the challengers were given actual notice of the decree and had a reasonable opportunity to object, or if a previous challenger had raised the same issues in a competent way and had been unsuccessful.[57]

In the *Price Waterhouse*[58] case, the Supreme Court decided that there is no violation of Title VII if an employer's action is based on "mixed motives,"[59] that is, a legitimate non-discriminatory motive combined with an illegitimate discriminatory motive.[60] Under these circumstances, a person may not be able to obtain reinstatement in a job if there were

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54. *Id.* at 761-62.

55. *Id.* at 762-63.

56. *Id.*

57. Pub. L. No. 102-166, Sec. 108, 105 Stat. at 1076. Section 108 provides in part:

> (B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws --
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> (i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had --
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> (I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and
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> (II) a reasonable opportunity to present objections to such judgment or order; or
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> (ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

*Id.*

58. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

59. *Id.* at 242.

60. *Id.*

legitimate reasons for discharge, and may not obtain damages.[61] But Section 107 says there is a violation of Title VII in such circumstances[62] and plaintiffs may be entitled to injunctive relief to deter future violations.[63]

In the *Lorance*[64] case, the Supreme Court held that the statute of limitations may foreclose challenges to the application of discriminatory seniority provisions of collective bargaining agreements even if plaintiffs were not aware of the problem until they suffered adverse effects.[65] Section 112 says that the statute will

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61. The main opinion, written by Justice Brennan, stated that if an employer-defendant, as an affirmative defense, can show by a preponderance of the evidence that its decision would have been the same even without the illegitimate discriminatory motive, then it is not liable. *Id.* at 246, 253.

62. Pub. L. No. 102-166, Sec. 107(a), 105 Stat. at 1075. In relevant part, Section 107(a) amends 42 U.S.C. § 2000e-2 by adding a new subsection (m) which provides:

> (m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice.

*Id.* (emphasis added).

63. Pub. L. No. 102-166, Sec. 107(b), 105 Stat. at 1075. Section 107(b) which amends 42 U.S.C § 2000e-5(g) in relevant part provides:

> (B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court --
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> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and
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> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

*Id.*

64. Lorance v. AT&T Technologies, 490 U.S. 900 (1989).

65. *Id.* at 905-06. The plaintiffs there were three female employees who were promoted then demoted in 1982. *Id.* at 902. Under the pre-1979 collective bargaining rules of the company the employees' pre-promotion seniority would have prevented their being demoted. In 1979, their union came to a new agreement with the employer whereby seniority would start to run

start running when the person is injured by the application of the seniority provisions.[66]

The bill also undoes the holding of a 1987 case, *Crawford Fitting*,[67] in which the Court construed the fee provisions of federal civil rights statutes[68] to preclude the award of fees for expert witnesses unless specifically authorized by the statute.[69] The 1991 Act provides that such expert fees are available in Title VII cases and in the new 1977A damage provision.[70]

Unfortunately, Congress did not address directly the holding of a 1990 Supreme Court case, *West Virginia University Hospitals, Inc. v. Casey*,[71] which denied expert fees under Section 1983,[72] the statute under which the great bulk of civil rights cases are brought. But the new law really undermines the rationale of Justice Scalia's decision in *Casey*[73] and new legislation will be sought soon to deal with it specifically.[74] The issue is important

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anew with each promotion. *Id.* This had the effect of stripping the recently promoted women of their accumulated seniority and leaving them open to a demotion. *Id.* The Court stated that since the claim was not based on a discriminatory on-its-face or as-applied seniority system, but on a claim that the seniority system was intentionally discriminatorily *changed*, the statute of limitation would start to run from the time it was changed. *Id.* at 905-06 (emphasis added).

66. Pub. L. No. 102-166, Sec. 112, 105 Stat. at 1078-79.

67. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987).

68. *Id.* at 439; 42 U.S.C. § 1981 (1986).

69. *Crawford Fitting*, 482 U.S. at 439.

70. Pub. L. No. 102-166, Sec. 113, 105 Stat. at 1079.

71. 111 S. Ct. 1138 (1991).

72. 42 U.S.C. § 1983 (1986). The relevant fee provision is found at 42 U.S.C. § 1988 which provides in part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.*

73. *Casey*, 111 S. Ct. at 1141. Justice Scalia followed *Crawford Fitting* and refused to interpret the words "reasonable attorney's fees" to include expert witness fees. *Id.*

74. *See* Voting Rights Extension Act of 1992, H.R. 5236, 102d Cong., "While the West Virginia decision had a severe impact on all relevant civil rights litigation, the impact on voting rights litigation is particularly detrimental." H.R. REP. NO. 656, 102d Cong., 2d Sess. (1992); *see also* Boss v. Union Free School Dist. #6, 1992 U.S. Dist. LEXIS 10001 at *6, n.2 (E.D.N.Y.

because as many of you know, employers, government agencies, school boards and other defendants in civil rights cases are able to employ batteries of experts to defend their practices. Unless plaintiffs are able to recover fees, they will not be able to retain experts to help both in proving violations and in addressing critical questions of remedy.

Although the legislation did not address *Casey*, it did undo another 1991 decision of the Court, *EEOC v. Arabian American Oil Co.*[75] In that case, the Court ruled (6-3) that Title VII does not apply extraterritorially to bar discrimination practices by U.S. firms against American citizens who are employed in the firms abroad.[76] Again, the majority stated that Congress had not specifically said that there should be extraterritorial application and it rejected legislative history that pointed in that direction.[77] The new law (Section 109) provides for extraterritorial application although it makes an exception where compliance would cause an employer to violate a law of the foreign country in which the facility is located.[78]

Those are some of the main provisions of the Civil Rights Act of 1991 as they relate to Supreme Court decisions of the past couple of years. Lest you believe that all of the issues are now clearly resolved, and I am sure you do not, I can assure there will be more conflicts in interpretation that will reach the Supreme Court. For example, what impact does that new law have on pending cases? Section 402 of the bill says that except as otherwise provided, the Act will take effect on the date of enactment.[79] The *Arabian American Oil* section[80] has a special provision that says that the extraterritorial provisions do not apply to

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July 6, 1992); Smith v. Petra Cablevision, 793 F. Supp. 417 (E.D.N.Y. 1992); Aranow v. District of Columbia, 791 F. Supp. 318 (D.D.C. 1992).

75. 111 S. Ct. 1227 (1991).

76. *Id.* at 1231.

77. *Id.* at 1231-32. *But see id.* at 1237-39 (Marshall, J., dissenting) (citing the legislative history found in Foley Bros. v. Filardo, 336 U.S. 281 (1949), to show that there is only a presumption against applying a statute extraterritorially, not a clear-statement rule).

78. Pub. L. No. 102-166, Sec. 109, 105 Stat. at 1077-78.

79. *Id.* at Sec. 402, 105 Stat. at 1082.

80. *Id.* at Sec. 109, 105 Stat. at 1077-78.

conduct occurring before the date of enactment.[81] From that you might conclude reasonably that other sections do apply to conduct occurring before the date of enactment, including conduct being challenged in pending cases. But some of the sponsors say that the bill has no "retroactive" application[82] while other sponsors say it does.[83] If the law does not have an impact on pending cases, we can expect more *Wards Cove* and *Patterson* decisions for the next several years even while new cases are being decided under the new rules. That may seem an absurd result to you, but you can be sure that this will be litigated right up to the Court.[84]

What is the impact of this constant struggle between a majority of the Court and the Congress? I have heard some people say that it is not a matter of great consequence. They argue that when Congress does not speak clearly in a statute, there is nothing wrong with the Court issuing a restrictive decision since Congress

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81. *Id.* at Sec. 109(c), 105 Stat. at 1078.

82. *See* 137 CONG. REC. H9505, H9548 (Interpretive Memorandum of Congressman Hyde):

> Absolutely no inference is intended or should be drawn from the language of subsection (b) that the provisions of the Act or the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act. Such retroactive application of the Act and its amendments is not intended.

*Id. See also* 137 CONG. REC. S15,472 (daily ed. October 30, 1991) (Interpretive Memorandum of Senator Dole and others); 137 CONG. REC. S15,483 (daily ed. October 30, 1991) (Interpretive Memorandum of Senator Danforth and others); 137 CONG. REC. S15,953 (daily ed. November 5, 1991) (Legislative History, Technical Corrections of Senator Dole).

83. *See* 137 CONG. REC. H9505, H9530 (Interpretive Memorandum of Congressman Edwards): "The bill states that it takes effect on the date of enactment. The intent of the sponsors is that this language be given its normal effect, and that the provisions of the bill be applied to pending cases except where the bill expressly provides otherwise." *Id.*

84. In the following cases the courts have refused to apply the Civil Rights Act of 1991 retroactively to pending cases: Landgraf v. USI Film Products, 968 F.2d 427 (5th Cir. 1992); Mozee v. American Oil, 963 F.2d 929 (7th Cir. 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370, 1375-77 (8th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992).

is free to correct the error.[85] There are several things wrong with this argument. One is that it begs the question of why the Court should continually interpret civil rights statutes to give the most restrictive readings to the rights and remedies provided by Congress. Indeed, there is a long prior history of the Court giving broad scope to laws designed to provide remedies for individual citizens.[86]

A second problem is with the assumption that Supreme Court error in interpreting federal statutes is easy to correct. As one who has been involved in these struggles for more than a decade, I can attest that this is not so. The repair of the damage done by the Supreme Court in the *Grove City* case took four years.[87] The Civil Rights Act of 1991 took more than 2 years.[88] During this period, many Brenda Pattersons lost their rights to fair treatment in the workplace.

Perhaps worse, every time civil rights statutes are reopened to correct problems created by the Supreme Court, we wind up with a new referendum on whether we should have these laws at all. The Jesse Helmses[89] and Orrin Hatches[90] in the Senate are very

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85. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 672 (1989) (Stevens, J., dissenting) ("Congress frequently revisits [Title VII] and can readily correct our mistakes if we misread its meaning.").

86. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (citing United States v. Price, 383 U.S. 787, 801 (1966)) ("[W]e must accord [civil rights legislation] a sweep as broad as its language."); *see also* H.R. REP. NO. 40(I), 102d Cong., 1st Sess. (1991) (Civil Rights and Woman's Equity in Employment Act of 1991) ("[T]he legislative history is replete with references to Congress's [sic] intention that civil rights laws are to be broadly construed consistent with their remedial purpose.").

87. Grove City College v. Bell, 465 U.S. 555 (1984), was decided on February 28, 1984. The decision was overruled by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, which was enacted on March 22, 1988.

88. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), was decided on June 5, 1989; the Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess. (1990), was jointly introduced to the Senate and the House of Representatives on February 7, 1990; in an amended version, the Civil Rights Act of 1991 was finally signed into law on November 21, 1991.

89. Senator Jesse Helms (Republican-North Carolina).

90. Senator Orrin A. Hatch (Republican-Utah).

adept at twisting the issues to make it appear that civil rights laws are somehow special interest bills for Blacks or other minorities.[91] And this time around they were aided by the White House decision to play the race card for political gain.[92] The toll of such racial divisiveness on the general welfare and on domestic tranquility is incalculable. In addition, it is a diversion. Efforts that might go into expanding Head Start,[93] working on issues of educational reform,[94] health care,[95] nutrition,[96] housing[97] and other

91. *See* 137 CONG. REC. S2292 (statement of Senator Helms).

> [S]ometime this year the Senate will most likely again consider another so-called Civil Rights Act. Judging by the version I have seen this legislation should be called a Quota Act, not a Civil Rights Act.
>
> In looking over this legislation there are several surprises which will oblige senators to choose between an America stratified by racial and ethnic quotas, an America whose law codifies a system where benefits and advantages are doled out according to group identity -- or an America where citizens advance through individual initiative and excellence.

*Id. See also* 136 CONG. REC. S3144 (statement of Senator Hatch).

> The bill will work fundamental shifts in Title VII of the 1964 Civil Rights Act. It will transform Title VII from a statute aimed at conciliation, administrative resolution, settlement, and placing a victim of discrimination in his or her rightful place in the work force into a statute in which conflict in the workplace will be exacerbated. Protracted, costly litigation will be the weapon of first resort. The bill will simply be a bonanza for lawyers.

*Id.*

92. *See* 137 CONG. REC. S15,440-02 (statement of Senator Levin entitled "The Issue of Race") ("By simplistically labeling the civil rights bill a quota bill, President Bush did a disservice to America.").

93. *See* Head Start Improvement Act of 1992, H.R. REP. NO. 763, 102d Cong., 2d Sess. (1992). The Head Start program provides "comprehensive health, nutritional, educational, social, and other services as will aid the children to attain their full potential; and [] provide for direct participation of the parents of such children in the development, conduct, and overall program direction at the local level." 42 U.S.C. § 9833 (1981).

94. *See* Neighborhood Schools Improvement Act, H.R. REP. NO. 294, 102d Cong., 1st Sess. (1992).

95. *See* National Health Care Act of 1992, S. 2817, 102d Cong., 2d Sess. (1992).

96. *See* Child Nutrition Amendments of 1992, H.R. REP. NO. 645, 102d Cong., 2d Sess. (1992).

measures to expand opportunities for all citizens are sapped by the need to preserve the basic ground rules of non-discrimination. The current Court in many respects is like the New Deal Court of the 1930's before its conversion, when the Court stymied almost all federal and state efforts to deal with the harsh economic consequences of the depression.[98]

## CONCLUSION

There is an air of unreality about the Court's recent opinions. In decisions during the 1970's and early 1980's involving affirmative action, the Court struggled to balance the interests of White workers who had vested status against those of minorities seeking opportunities that had been denied them.[99] In the recent cases, there is no identification of the interests to be served by constructing new hurdles for minorities and women. Nor does there appear to be any understanding of the larger purposes of the civil rights laws, of the needs of the nation for a trained, competitive work force, of the pragmatic need that an earlier court

97. *See* Rural Housing Improvement Act of 1992, S. 2562, 102d Cong., 2d Sess. (1992).

98. *E.g.*, Carter v. Carter Coal, 298 U.S. 238 (1936) (invalidating the Bituminous Coal Conservation Act of 1935 which attempted to set maximum work hours per day for coal miners); United States v. Butler, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act of 1933 which attempted to give relief to farmers suffering from depressed price markets); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act of 1933 which attempted to stabilize prices in hopes of improving working conditions for labor).

99. *See* Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (relating to local government contracts); Johnson v. Trans. Agency, 480 U.S. 616 (1987) (relating to promotion practices); United States v. Paradise, 480 U.S. 149 (1987) (relating to promotion practices); Local 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986) (relating to hiring and promotion practices); Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (relating to hiring practices); Wygant v. Jackson Bd. of Educ., 467 U.S. 267 (1986) (relating to layoffs); Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984) (relating to layoffs); Fullilove v. Klutznick, 448 U.S. 448 (1980) (relating to federal government contracts); United Steelworkers v. Weber, 443 U.S. 193 (1979) (relating to hiring practices); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (relating to university admissions) .

identified to assume that past discrimination not work a cumulative disadvantage and that people who can do a job be given the chance to do it.